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THE PRIVILEGE AGAINST SELF-INCRIMINATION AS APPLIED TO CUSTODIANS OF ORGANIZATIONAL RECORDS

WILLIAM H. FRASER

One of the most critical areas of the courts' inquisitorial power involves organizational documents—books and records of the business, social, and political combines so much a part of the modern American scene. The development of the "organization man," and the diverse associations to which he belongs, has focused government attention—and regulation—upon the activities of large numbers of combinations, associations, and organizations. Perhaps it is pertinent to ask what areas of organization activity remain immune from the government subpoena. When may an officer or member rely upon the privileges he could assert with regard to his private affairs?

One privileged area long subject to advancing restriction has had new vitality returned to it.[1] The privilege against self-incrimination, the "bulwark against iniquitous methods of prosecution,"[2] was held to extend to oral testimony concerning the whereabouts of union records by a custodian who, in response to a subpoena duces tecum and a subpoena ad testificandum, stated he did not have the demanded papers in his possession.[3]

Joseph Curcio was the secretary-treasurer of Local 269 of the International Brotherhood of Teamsters during a grand jury investigation of union-management racketeering in the New York area. Widespread charges that Local 269 was a "phantom local" chartered for the express purpose of gaining control of the New York Joint Council and was controlled by convicts, gangsters, and hoodlums had been circulated in the local press and was one of the specific areas of inquiry before the grand jury. Mr. Curcio was served with two subpoenas—a personal subpoena ad testificandum and a subpoena duces tecum addressed to him as custodian of the records of Local 269. He appeared before the grand jury but failed to produce the requested books and records. He testified that he was the secretary-treasurer of Local 269, that the union had maintained a set of books and records, that they had not been in his possession at the time the subpoenas were served, and that they were not now in his possession. He refused, on the

[1] Curcio v. United States, 354 U.S. 118 (1957).
[2] United States v. White, 322 U.S. 694 (1944), at 699.
[3] Curcio v. United States, footnote 1, *supra*.

ground of self-incrimination, to answer any questions as to the whereabouts of the documents or who had possession of them.

The district court directed Mr. Curcio to answer a selected fifteen questions relating to when he had last seen the records or who might presently have them.[4] He attempted to justify his claim of privilege, but the court ruled that he had not made a sufficient showing of possible incrimination. When he persisted in his refusal to answer the questions, he was summarily adjudged in criminal contempt and sentenced to six months in jail, provided that he could purge himself of the contempt by answering the questions.

In affirming the conviction, the Court of Appeals for the Second Circuit, through Judge Medina, held that the petitioner had failed to show the fifteen questions might incriminate him, that the privilege against self-incrimination did not attach to the questions put to him relating to his failure to produce the books and records, and that he had been accorded a fair hearing.[5]

On certiorari before the United States Supreme Court, the Government withdrew its contention that the burden of showing possible incrimination had not been met. So the issues before the Court narrowed to considering whether the privilege against self-incrimination, personal to the petitioner, attached to questions relating to the possession and whereabouts of books and records which he had failed to produce pursuant to the subpoena. The Supreme Court reversed the decisions of the lower courts.[6] In a unanimous opinion, the Court found that the representative duty which requires custodians to produce corporate or association records in such cases did not require oral testimony from the witness as to the circumstances of his failure to produce. The privilege against being "compelled to be a witness against himself" proscribed his being compelled, in the absence of a grant of adequate immunity, to condemn himself by his own oral testimony, even in relation to unprivileged books and records which he had been ordered to produce.

It should be noted that Mr. Curcio's conviction rested solely on his

[4] Typical questions from the fifteen upon which the contempt order was based are: (1) Referring to the books and records of Local 269 of the International Brotherhood of Teamsters, have you at any time been in custody of those books and records? (2) Did you have custody and control of these records last Thursday? (3) Who has any of these records today, if you know? (4) Who had any or all of these records a week ago yesterday?

[5] 234 F.2d 470 (1956).

[6] United States v. White, 322 U.S. 694 (1944); Wilson v. United States, 221 U.S. 361 (1911).

refusal to testify pursuant to the subpoena ad testificandum, as he had not been charged with failure to produce the demanded documents.

While the history of the privilege against self-incrimination in this area antedates it,[7] the leading case modernly is *Wilson v. United States*.[8] Previous to the *Wilson* case, the Court had held that the officer of a corporation could claim no privilege on the ground that the corporation might be incriminated.[9] But Wigmore stated the rule to be that an officer might refuse to present the demanded documents on the ground that he personally might be incriminated by them.[10] This was the rule in England[11] and in several states.[12]

The majority in the *Wilson* case refused to adopt the rule of these states. The Court ruled that the privilege was a personal one reserved to natural individuals and that the corporation was a creature of the state, drawing its powers and very existence from a grant of the state. The corporation could not assert a privilege with regard to the subpoenaed documents, and the officer acted only as its agent in the retention and maintenance of them. He could be forced to turn them over to his successor by the corporation and was amenable to that body for any disposition it might require. Since the officer of a corporation held the documents only as an agent, he could assert no personal privilege as to their production. The Court further pointed out that the records sought were those which all corporations were required to maintain and were of a semi-public nature. Thus, two independent grounds for the *Wilson* holding emerge: (1) the peculiar nature of corporate bodies and (2) the fact that the records demanded were required to be kept by law.

This rule as applied to corporate bodies was implemented and affirmed by a number of later decisions.[13] *Grant v. United States* extended the rule to the records of dissolved corporations, holding that such records retained their "public character" and were not privileged.[14] In *United States v. Austin-Bagley Corp.*,[15] the Second Circuit,

[7] Rex v. Purnell, 1 Wm. Bl. (Eng) 37 (1748); see dissent by McKenna, J., in Wilson v. United States for citation and discussion of common law precedent in this area.

[8] 221 U.S. 361 (1911).

[9] Hale v. Henkel, 201 U.S. 43 (1906). The basis for the decision was a holding that only natural persons were entitled to claim the privilege against self-incrimination.

[10] 4 WIGMORE, EVIDENCE, § 2259 (1st ed. 1905).

[11] Rex v. Purnell, footnote 7, *supra*.

[12] *In re* Moser, 138 Mich. 302, 101 N.W. 588 (1904); *Ex parte* Hedden, 29 Nev. 352, 90 Pac. 737 (1907).

[13] Essgee Co. v. United States, 262 U.S. 151 (1923); Grant v. United States, 227 U.S. 74 (1913).

[14] See Wheeler v. United States, 226 U.S. 478 (1913).

[15] 31 F.2d 229 (2d Cir. 1929), *cert. denied* 279 U.S. 863 (1929).

speaking through Judge Learned Hand, held that the custodian of corporate documents which had been subpoenaed could be compelled to identify them. "(S)ince the production can be forced, it may be made effective by compelling the producer to declare that the documents are genuine."[16] *Brown v. United States* held that the officer of an unincorporated association must present the demanded documents to the judge for determination of their incriminating character in order to assert a privilege against self-incrimination with regard to such documents.[17] It had also been held that the officer who does not produce the books in response to a subpoena is under an affirmative duty to explain what happened to them.[18] It should be noted that, after the *Curcio* decision, the effect of these last-cited cases is somewhat limited.[19] The *Curcio* opinion does not discuss them.

In 1944, the Supreme Court established that the books and records of an unincorporated labor union were subject to subpoena and that the custodian of them could exercise no personal privilege upon the ground that the records might tend to incriminate him as an individual.[20] In the *White* case, the Court stated:

> But individuals, when acting as representatives of a collective group, cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. Rather they assume the rights, duties and privileges of the artificial entity or association of which they are agents or officers and they are bound by its obligations. In their official capacity, therefore, they have no privilege against self-incrimination. And the official records and documents of the organiza-

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[16] 31 F.2d at 234. But see discussion in Curcio v. United States, 354 U.S. 188 (1957), at 124.

[17] 276 U.S. 134 (1928). Brown was an officer of a furniture dealers association. A federal grand jury issued a subpoena duces tecum to Brown seeking certain records and correspondence in his possession. He refused to produce them to the grand jury on the grounds that the association was not a legal entity subject to suit and that he had not been properly subpoenaed and sworn. The Supreme Court held that he could not raise the privilege against self incrimination for the first time on appeal where he had not produced the documents for the lower court's ruling on that plea. The Court specifically reserved the question as to whether Brown stood in such a relation to the records as to have had a privilege had he properly invoked it.

[18] United States v. Bryan, 339 U.S. 323 (1950), where the Court suggested in dicta that a witness might be tried for obstructing justice where he failed to explain the non-production, and Consolidated Rendering Co. v. Vermont, 207 U.S. 541 (1908).

[19] The Curcio case holds specifically that a witness is able to assert the constitutional privilege in response to questions concerning his failure to produce subpoenaed records and further suggests that the privilege exists with regard to all oral testimony except the identification of those records which are produced, upon which the court specifically reserved judgment. It should be noted that the witness in the Bryan case, note 18, *supra,* did not assert the privilege against self-incrimination, but merely stated that she could not produce the records without authorization.

[20] United States v. White, 322 U.S. 694 (1944).

> tion that are held by them in a representative rather than in a personal capacity cannot be the subject of the personal privilege against self-incrimination, even though the production of the papers might tend to incriminate them personally. . . . Such records and papers are not the private records of the individual members or officers of the organization. . . .[21]

The test to be applied to determine whether the organization was of such a character as to fall within the scope of this rule was:

> [W]hether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the purely private or personal interests of its constituents, but rather to embody their common or group interests only.[22]

Thus the custodian of an "impersonal" association could be compelled to produce books and records, *the maintenance of which was not required by law.* It had long since been accepted that the peculiar nature of corporate bodies was sufficient grounding for a lack of personal immunity as to the production of their records,[23] and it was later held that not even an *individual* could assert a privilege as to records *required* to be kept by law in the exercise of valid government regulation of the subject to which the records alluded.[24]

The *Wilson* decision that a corporate custodian could not raise the privilege with regard to corporate records was extended to unions in the *White* opinion, and further, the Court laid down a test to determine which associations and combinations came within that rule and which did not. But in *Shapiro v. United States,* the language of the *Wilson* case was relied on heavily as authority for the proposition that no privilege could be raised as to records required by law to be maintained.[25] The validity and limits of this exception are beyond the scope of this Comment, except as they affect the privilege of custodians in particular.[26] These two rules, one applicable to custodians

[21] 322 U.S. at 699.

[22] 322 U.S. at 701. Unions were held clearly to fall within this rule.

[23] United States v. Fleischman, 339 U.S. 349 (1950); Grant v. United States, 227 U.S. 74 (1913); Essgee Co. v. United States, 262 U.S. 151 (1923).

[24] Shapiro v. United States, 335 U.S. 1 (1948), holds that the privilege, which exists as to private papers, does not protect individuals against being forced to produce records required by law to be kept in order that there may be suitable information.

[25] 335 U.S. at 16 (1948).

[26] The Shapiro decision was a five-to-four ruling. The facts of the case would limit the holding to those instances where the attempt to raise the privilege was to thwart the particular purpose intended to be effected by the requirement to maintain records. Thus, a privilege as to sales tax records might exist where the individual was under investigation for running a lottery in connection with his business, but not in a suit for failure to pay taxes.

only and the other to all individuals, have been blended so artlessly in a number of later decisions as to make unclear the limitations of either.[27]

Government regulation of association activity requires a variety of records to be maintained. While there is language in *Wilson* which, when lifted from context, might support a thesis that all records of an individual or association which were required to be maintained by law were "public" records which could not be the subject of a privilege,[28] *Shapiro v. United States* indicates that the non-privileged area is not that broad. A vigorous dissent in *Shapiro* should be the basis for still further restriction upon this rule, that has as its source an illogical "make-weight" argument in the *Wilson* case.[29]

The Court in *United States v. White* clearly grounded its decision upon the nature of the organization and its activities. No issue was raised as to whether the records sought were required by law. A test based upon the impersonal character of the membership and activities was the criterion used by the Court to determine whether the custodian could assert a personal privilege as to those records. And a clear implication that the court felt there were organizations whose custodians could assert a privilege is raised by its statement of a test to so determine. The scope of this test was left to future decisions.

In spite of the clear language of the *White* case as to the test for determining whether the custodian of an association's records may assert a privilege, subsequent cases have failed to develop the test by application. The confusion that is reflected in cases which should present the question squarely has resulted in obscuring the test of impersonality, rather than in clarifying it. For instance, the bland assertion in the *Shapiro* case that "corporations and associations are

[27] See United States v. Field, 193 F.2d 92 (2d Cir. 1951), discussed in the text *infra*.

[28] ". . . (T)he principle applies not only to public documents in public offices, but also to records required by law to be kept in order that there may be suitable information of transactions which are the appropriate subjects of governmental regulation, and the enforcement of restrictions validly established. There the privilege which exists as to private papers cannot be maintained." 221 U.S. at 380 (1911).

[29] Justice Frankfurter's dissent in the Shapiro case points out that the Wilson opinion was actually grounded on the rule there enunciated to effect sound regulation of such artificial persons. To extend the records-required-by-law argument to its logical limits would result in such a sweeping restriction of the individual privilege against self-incrimination as to be obviously contrary to a number of valid precedents in this area. See Shapiro v. United States, 335 U.S. 1 (1948), dissenting opinion of Frankfurter, of transactions which are appropriate subjects of government regulation. Shapiro had refused to produce certain records required under O.P.A. regulations in force during World War II. He asserted that the documents were privileged upon the basis that they might tend to incriminate him. See also Davis v. United States, 328 U.S. 582 (1946); United States v. Darby, 312 U.S. 100 (1941).

required to keep records for state and federal tax and regulatory purposes, therefore, no privilege exists" does violence to both rules derived from the *Wilson* case. It ignores the impersonality test to be applied to associations and also seems to impose a limitation on the purposes for which the government may require the keeping of non-privileged records.[30] The number of appellate cases discussing the issue is not large, and perhaps some comment will illustrate the course of the law since the *White* case was decided in 1944.

The Supreme Court, in *United States v. Fleischman*,[31] stated in dictum that the Joint Anti-Fascist Refugee Committee was an organization with a character so impersonal as to deny a custodian any privilege in the production of its records. But in that case the court was not required to rule on the problem, since the basis upon which the defendant had refused to produce the papers demanded by a congressional committee was that she did not possess them. She did not raise an issue of her personal self-incrimination. The value of the dictum is perhaps best indicated by the Court's citation of *Brown v. United States*[32] for the proposition that the *Wilson* rule as to corporate records was applicable to unincorporated organizations as well. The holding in *Brown* was that, to sustain the privilege, the non-corporate custodian must produce the documents to the judge in order that he may determine whether they are incriminating or not. Such a holding infers that a privilege exists if the documents are in fact incriminating. The Supreme Court, in *Fleischman*, cites the *White* case for the proposition that the officers of any association are as responsible for the production of association records as a corporate officer would be.[33]

In *United States v. Field*[34] trustees of a bail fund were held in contempt for failure to produce the records of their trusteeship. The Second Circuit quoted that portion of the *White* case which stated that official records held in "a representative rather than in a personal capacity cannot be the subject of the personal privilege. . . ."[35] and went on to assert that trustees of a trust fund, even more clearly than union officers, are acting as representatives of a group, rather than in their own purely private interest. No mention was made of the *nature* of the association; thus the test laid down in the *White* case as to the nature of an organization to whose records the privilege would not

[30] See footnote 26, *supra*.
[31] 339 U.S. 349 (1950).
[32] 226 U.S. 134 (1928). See note 17, *supra*.
[33] 339 U.S. at 358.
[34] 193 F.2d 92 (2d Cir. 1951), *cert. denied*, 342 U.S. 894 (1951).
[35] 193 F.2d at 97.

attach was not discussed. The test of whether a custodian was "representative" or not is clearly no test at all. If there is a group of any sort and an agent has custody of their books, he serves by definition in a "representative" capacity. Thus the *Field* case renders meaningless the rule in *White* while purporting to follow it. And here again the vitality even of that remarkable case is lessened by an alternative, hard-to-follow application of the *Shapiro* rule. The law which required bail bondsmen to maintain records subject to government inspection was not cited. The court recognized that some officers of a public or private character could raise the privilege. It is apparent that a contrary holding would require bank presidents to disclose their own embezzlements and public officials, bribes they had accepted. But they applied the *Shapiro* rule, because the duty of these "appellants was much more direct and immediate than any undertaken by wholesalers and retailers who continued in their respective businesses after the OPA regulations . . . went into force." This comparative voluntariness test is substituted for the finding of a statute or regulation requiring the keeping of specific records.

The *Field* case attempts to ground its decision on either or both of the two grounds discussed above for not finding the privilege. It lacks conviction in each particular. The fact that five circuit judges and one Supreme Court justice sat in judgment on various aspects of this case,[36] indicates the lack of definition which has been given the respective rules governing use of the privilege with regard to documents. In light of the confusion of the Second Circuit in this area, where it has had more opportunity to consider the problems than any other court, one can validly wonder if the requirements of *White* and *Shapiro* in the application of their respective holdings can have any currency anywhere except in the Supreme Court. And the refusal of certiorari in the *Field* case leaves the whole question still in doubt. However, since one holding of the *Field* opinion was overruled in the *Curcio* case,[37] perhaps there is not so much significance in that as might be presumed.

The closest any circuit court has come to applying the impersonality test of the *White* case occurred in *Communist Party v. Subversive Activities Control Bd.*[38] Section 3 of the Subversive Activities Con-

[36] Justice Reed, 193 F.2d 86 (1951); Judge Swan, 190 F.2d 554 (1951); Judge Learned Hand, 190 F.2d 556 (1951); and the three judges who heard the principal case on appeal.

[37] Curcio v. United States, 354 U.S. 118 (1957).

[38] 223 F.2d 531 (D.C. Cir. 1954).

trol Act of 1950[39] requires "Communist-action organizations" to furnish membership lists to the Attorney-General and to give certain other information, including complete financial data. One of the issues raised was that to require an officer to sign such a list and report was to require him to give testimony against himself. And further, it was urged that the Communist party was not an organization of so "impersonal" a character as to come within the rule of the *White* case. The majority, citing *United States v. White,* found that, were a grand jury to subpoena the records and membership list of the party, the custodian thereof would be compelled to produce. The court recounted the facts of *White* and quoted those provisions of the holding which were broad in their language, seemingly making any association's custodian amenable to process. The only reference to the *White* test as the writer has set it out was the statement that, if records of labor unions were not subject to the privilege, then the records of political parties were not either, because a political party was far more "impersonal" than a labor union. The dissent[40] held that, since the party was engaged in a criminal conspiracy, the "public" features of other associations which made their activities "impersonal" were not present.

The United States Supreme Court granted certiorari, but reversed the court of appeals decision on non-constitutional grounds and therefore, did not reach the problem of constitutional privilege.[41]

The bases for excluding books and records of organizations from the claim of personal privilege on the part of their custodian are twofold. First, the records are not his property—he has them only in a representative capacity and therefore cannot assert a privilege that is personal to him with regard to the property held by him in this purely official capacity. Second, the organization whose representative he is, is not a natural person but an entity that exists only through a grant of the state or at least enjoys peculiar benefits derived from the state. Thus, the organization which enjoys a special status must be amenable to the laws of the society. No means of dealing with organizations exist except through their agents. And since the organization does not have a privilege against self-incrimination,[42] its agents should not be able to assert one on its behalf. Since the organization cannot assert a privilege through its agents, and the agents cannot assert a privilege in their own behalf with regard to documents not

[39] 64 STAT. 989, 50 U.S.C.A. §§ 781-826 (1950).
[40] 223 F.2d at pp. 578-579.
[41] Communist Party v. Subversive Activities Control Bd., 351 U.S. 115 (1956).
[42] Hale v. Henkel, 201 U.S. 43 (1906).

held by them in a personal capacity, no privilege will exist as to association records, provided the organization is created or peculiarly benefited by the state.[43]

There are any number of organizations which do not meet these criteria. It might be suggested that thereby they fall without the test of the *White* case. The major problem in supporting this theory with case law is a practical one—the type of organization which falls outside this test is not likely to have its records subjected to judicial process. If the organization is not engaged in an activity which is subject to government regulation and to a regulatory requirement that it keep certain records, so as to fall within the scope of the *Shapiro* rule, nor engaged in an impersonal group endeavor, so as to come within the *White* holding, the situations in which its records are likely to be pertinent would seem to be limited to civil actions regarding funds or denial of membership benefits.[44] In those cases the claim of privilege on the basis of self-incrimination is unlikely to become pertinent, because the civil suit situation can be resolved by application of rules of court denying the right to proceed to parties who refuse to make discovery.[45] But there remains a problem for the attorney whose client is a custodian of records which might provide a link in the chain of evidence against him in a future criminal trial as to whether there is ever a recognized basis for a claim of privilege and, if so, if there is one in the particular case of his client.

One might deduce from the language already quoted from the *White* case that at least the court was unwilling to assert that no situations which would make the claim of personal privilege sustainable existed. The court there stated a test to be applied, and no further help can be derived from that opinion except for the holding that a labor union clearly came within the scope of that test. The *Field* case, since it did not apply the test in discussing its holding, does not provide any further assistance unless it be a suggestion that the test is not going to receive a broad construction by courts in the future. And, except for the *Communist Party* case, there is a complete dearth of cases which *do* apply the *White* test. Thus, any suggestions as to criteria for applying the test of impersonality contained within this Comment

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[43] Query if this is the test proposed by the Court in United States v. White, 322 U.S. 694 (1944), at least in substance.

[44] An example is found in Bradley v. O'Hare, 156 N.Y.S.2d 533 (1956).

[45] See RULES OF PLEADING, PRACTICE, AND PROCEDURE, RULE 37, 34a Wn.2d 101 (1951). *But see* Bradley v. O'Hare, *supra.*

are deserving of no acceptance except as opinions of the writer derived from somewhat scant inferences.

One of the primary difficulties in the application of the *White* test by courts or its use in advising clients is the generality of its terms and the contradiction inherent in its language. Perhaps the majority of organizations perform some personal service or confer some private benefit upon their members, while at the same time advancing group or common interests in an impersonal manner. The language used by the court states two propositions; (1) that the organization *not* be *purely* private or personal in its membership or activities, and (2) that it embody their common or group interests *only*. A large majority of organizations are not purely private, so as to come within the one test, nor concerned with common or group interests *only*, so as to fall within the other. The key word "impersonal" has been seized upon by those courts acknowledging the existence of the test. But until some decisions have come directly to grips with this problem and cast some light upon the application of this language, it provides a meager basis for a determination of legal right. The idea embodied in this test, were it developed by further case law into a workable tool, is realistic and a legitimate distinction upon which to determine the existence of constitutional privilege. The suggestion that no fiduciary or person acting in a representative capacity can claim the privilege will not stand the test of discriminate inspection.[46]

Nevertheless, it would seem an appropriate observation that the situations in which a custodian will be able to raise successfully a privilege that he personally would be incriminated by documents of an organization are going to be rare. The lack of federal or state cases allowing such a claim gives scant encouragement to the counsel contemplating advising such a plea except where the state refuses to follow federal cases.

It is clear from the *Curcio* opinion, however, that a custodian is not bound to give oral testimony which might incriminate him in relation to his non-production or prior custody of the documents. Nor can he be compelled to say orally what the documents would contain if produced. The court specifically reserved the question as to whether he could be required to identify the documents as genuine and distinguished that question on the basis that to require such an assertion of

[46] What would be the status of notes interchanged by members of a criminal conspiracy and plans drawn by them when held by one member of the conspiracy? This is perhaps the extreme example, but nevertheless, here one has an "organization."

genuineness was only to make explicit that which was implicit in the very act of production. Thus, it infers that not only can the custodian refuse to testify orally in the case where he fails to produce, but also can refuse to testify in any particular about documents he does produce where such particular might add a link to the chain of evidence against him. If nothing else, the case reaffirms the proposition that the privilege against self-incrimination does exist in this area and that the custodian is not wholly without the privilege when he appears in response to the subpoenas.

SUMMARY

The present status of the law with regard to custodians of organization records and the privilege against self-incrimination can be summarized in a series of rather terse rules leaving no room for argument and in two questions which have answers of only doubtful validity. An officer of a corporation cannot withhold either testimony or documents on the basis that his corporation would be incriminated. Nor may the custodian of an unincorporated association withhold documents on the basis that his association or he, himself, would be incriminated by their production where the organization is so impersonal in the scope of its membership or activities that it embodies their common or group interests only, rather than their personal and private interests. Unions, at least, are such associations. The custodian may be required to assert the genuineness of documents he produces in response to a subpoena duces tecum. But the custodian cannot be required to testify orally concerning the non-production, present whereabouts, or any details concerning the records produced or not produced where such testimony might incriminate him. And the claim of privilege is not available to either an individual or custodian where the specific records sought are required by a valid exercise of governmental power to be kept by one engaged in a particular activity.

And the questions remain whether the custodian of records of an unincorporated association may exercise the privilege in response to a subpoena duces tecum and, if so, what criteria will determine whether a particular case is a proper one for such a claim to be raised. It has been fourteen years since the *White* opinion was handed down, and there is no indication that an answer to these problems is imminent. Until such an answer is given by the federal courts, it is doubtful that the language of the *White* case will provide a useful refuge to the custodial officer of any organization.